at the date that the writ was posted to the first defendants at the address shown in the search made on behalf of the plaintiffs.

The first defendants did not succeed in satisfying me that due service of the writ had not been effected. Clearly as at January 16, 1983 the registered office of the first defendants was at Wisma Lim Foo Yong. Haji Abdul Razak's affidavits and the result of the search exhibited by him reveal that as at January 20, 1986 the registered office was at ENE Plaza. He does not say when the change took place and accordingly just as the plaintiffs had appeared to have done, the court also had to and relied on the results of the search made on behalf of the plaintiffs and concluded that on the date the service of the writ was effected the registered office of the first defendants was at the Wisma Lim Foo Yong address.

Order accordingly.

Solicitors: *Rashid & Lee; Wong Sam Nuck & Co.*

HOPEWELL CONSTRUCTION CO. LTD. v. EASTERN & ORIENTAL HOTEL (1951) SDN. BHD.

[O.C.J. (Zakaria Yatim J.) August 8, 1986]

[Kuala Lumpur – Originating Summons No. C78 of 1984]

Contract – Non-compliance with Companies Act 1965 – Whether void and illegal – Contracts Act 1950, s. 24 – Companies Act 1965, s. 332.

Companies and Corporations – Foreign company – Non-compliance with Companies Act – Whether contract entered into void and illegal – Contracts Act 1950, s. 24 – Companies Act 1965, s. 322.

The plaintiff is a company incorporated in Hong Kong. On May 11, 1982, the plaintiff entered into a contract ("the said contract") for the construction of a building in Penang. Subsequent to entering into the said contract, the plaintiff took possession of the building site on October 1, 1982. The plaintiff carried out certain works and was paid for the works carried out. Certain disputes then arose between the parties to the said contract. The dispute before the court now is whether the said contract is void because the plaintiff, being a foreign company, did not register itself in Malaysia as a foreign company pursuant to the provisions of the Companies Act 1965. With regard to the other disputes between the parties, the plaintiff wishes that these disputes be resolved by arbitration as stated in prayer 2 of their claim, if the court holds that the said contract is a valid contract.

The question also arose as to whether the contract was void because it was against public policy.

Held: (1) in order to render the said contract void under section 24(b) of the Contract Act 1950, there must be a sufficient nexus between the provisions of the Companies Act and the said contract. In the present case, there is nothing in the Companies Act which prohibits the making of the said contract. The Act does not lay down any requirement which a foreign company must comply before entering into such contract. There is therefore no sufficient nexus between the Companies Act and the said contract. The contract in question is a valid contract under section 24(b) of the Contracts Act 1950;

(2) the contract is also not opposed to public policy under section 24(e) of the Contracts Act 1950;

(3) an order in terms of prayer 2 should also be granted.

Cases referred to:

(1) *Curragh Investments Ltd.* v. *Cook* [1974] 1 W.L.R. 1559, 1563.
(2) *Asia Television Ltd. & Anor.* v. *Viwa Video Sdn. Bhd.* [1984] 2 M.L.J. 304, 305 & 306.
(3) *St. John Shipping Corporation* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267.
(4) *Theresa Chong* v. *Kin Khoon & Co.* [1976] 2 M.L.J. 253.

ORIGINATING SUMMONS.

Robert Lazar for the plaintiff.

Y. M. Chin for the defendant.

Cur. Adv. Vult.

Zakaria Yatim J.: This is an application by the plaintiff by originating summons seeking the order of the court:

(1) for a declaration that the contract dated May 11, 1982 and entered into between the plaintiff and the defendant was valid and effectual until such time as it was properly determined by either party notwithstanding the fact that the plaintiff was at all material times a company incorporated under the laws of Hong Kong and was not registered as a foreign company in Malaysia pursuant to the provisions of the Companies Act 1965;

(2) that Hopewell Construction Co. Limited is entitled to request the president or vice-president for the time being of the Pertubuhan Akitek Malaysia to nominate an arbitrator pursuant to the provisions of clause 34(1) of the conditions of the said contract, for the purposes of determining the disputes which have arisen between the parties as described in the notice of disputes contained in Hopewell Construction Co. Limited's application.

The facts are not in dispute. The plaintiff is a company incorporated in Hong Kong. On May 11, 1982, the plaintiff entered into a contract ("the said contract") for the construction of a building in Penang. Subsequent to entering into the said contract, the plaintiff took possession of the building site on October 1, 1982. The plaintiff carried out certain works and was paid for the works carried out. Certain disputes then arose between the parties to the said contract. The dispute before the court now is whether the said contract is void because the plaintiff, being a foreign company, did not register itself in Malaysia as a foreign company pursuant to the provisions of the Companies Act 1965. With regard to the other disputes between the parties, the plaintiff wishes that these disputes be resolved by arbitration as in prayer 2, if the court holds that the said contract is a valid contract.

The question for the court to consider is whether the said contract entered into between the parties is a valid contract. Section 24 of the Contracts Act 1950 states:

"The consideration or object of an agreement is lawful, unless –

...

(b) it is of such a nature that, if permitted, it would defeat any law;

...

...

(e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said be unlawful. Every agreement of which the object or consideration is unlawful is void."

Mr. Chin, counsel for the defendant, in his written submission referred to the various sections relating to foreign companies in the Companies Act. In particular, he referred to section 332, which requires a foreign company to register itself with the Registrar of Companies within one month after it established a place of business or it commenced to carry on business within Malaysia. He also referred to section 349 which provides a penalty for default by a foreign company in complying with, *inter alia*, section 332. He submitted that the section which imposes a penalty must be taken to imply a prohibition of all unregistered foreign companies from carrying on business in Malaysia and consequently to prohibit by necessary inference, all contracts which unregistered companies make. He further submitted that the requirements as to registration contained in section 332 of the Companies Act are so comprehensive that it would be contrary to public policy to allow an unregistered foreign company to enforce such a contract.

I shall first examine section 24(b) of the Contracts Act and see whether the said contract between the parties is of such a nature that it would defeat the relevant provisions of the Companies Act. In order to render the said contract void, there must be a sufficient nexus between the provisions of the Companies Act and the said contract. This test was laid down by Megarry J., as he then was, in *Curragh Investments Ltd.* v. *Cook.*[1] In his judgment in that case, Megarry J. said:

"I accept of course, that where a contract is made in contravention of some statutory provision then, in addition to any criminal sanctions, the courts may in some cases find that the contract itself is stricken with illegality. But for this to occur there must be a sufficient nexus between the statutory requirement and the contract. If the statute prohibits the making of contracts of the type in question, or provides that one of the parties must satisfy certain requirements (*e.g.* by obtaining a licence or registering some particulars) before making any contract of the type in question, then the statutory prohibition or requirement may well be sufficiently linked to the contract for questions to arise of the illegality of any contract made in breach of the statutory requirement. But it seems to me a far cry from that to the breach of statutory requirements which are not linked sufficiently or at all to the contract in question. There are today countless statutory requirements of one kind or another, yet I cannot believe that an individual or a company who is in breach of any of these requirements (for example, under the Factories Acts) is thereby disabled from making a legal contract for the sale of land or validly entering into covenants for title. To take an example that was mentioned in argument, I do not think that it could seriously be contended that every contract made by an English company, whether for the sale of land or otherwise, is illegal if, when it is made, the company is liable to prosecution and fine for failing to comply with some provision of the Act of 1948, for example, for not filing its annual returns in due time. Such a doctrine, for which I can see no justification, would result in chaos. If in the present case I assume that the vendor is in demonstrable breach of sections 407 and 416, I am still quite unable to see how this provides any ground for contending that the covenants for title that the vendor must give will be impaired by illegality. The breach of the law and the covenants for title seem to me to be wholly unconnected."

The passage quoted above was cited with approval by the Federal Court in *Asia Television Ltd. & Anor.* v. *Viwa Video Sdn. Bhd.*[2] Abdoolcader F.J., as he then was, in delivering the judgment of the court said:

"The correlation between the two legislative enactments must in our view depend on whether there is a nexus between them. Mr. Davidson agrees in answer to a question we put to him that such a nexus is a necessary prerequisite and

that the burden is on the respondents to establish this as between the two Acts. In *Curragh Investments Ltd.* v. *Cook*[1] it was held that for a contract to be illegal as being made in contravention of some statutory provision there had to be a sufficient nexus between the statutory requirement and the contract, and that where statutory requirements were not linked sufficiently, or at all, to the contract no question of its illegality arose."

Applying the test laid down by Megarry J. to the present case, the following questions have to be considered: (a) whether the Companies Act prohibits the making of a contract of the type in question; and (b) whether the Companies Act provides that one of the parties must satisfy certain requirements before making such a contract? In order to answer these questions, it is necessary to look at the relevant provisions of the Companies Act.

Section 332(1) of the Companies Act provides that every foreign company shall, within one month after it establishes a place of business or after it commences to carry on business in Malaysia, lodge with the Registrar of Companies for registration certain documents, including a certified copy of the certificate of its incorporation or registration in its place of incorporation or origin; a certified copy of its charter, statute or memorandum and articles; a list of its directors, notice of the situation of its registered office in Malaysia; and a statutory declaration made by the agent of the company. On payment of the appropriate fees and subject to the provisions of the Act, the Registrar may register the company. Section 333 requires a foreign company to have a registered office in Malaysia. Section 334 states that on the registration of a foreign company, the Registrar shall issue a certificate, which is *prima facie* evidence in all courts of the particulars mentioned in the certificate. Section 349 provides that if default is made by any foreign company in complying with any provision under Division 2 of the Act, which deals with foreign companies, the company is guilty of an offence under the Act and liable to pay a default penalty.

I find nothing in the Companies Act which prohibits the making of the said contract in question, which is a contract for the construction and completion of the E and O Complex in Penang. The Act also does not lay down any requirement which a foreign company must comply with before entering into such a contract. There is, therefore, no sufficient nexus between the Companies Act and the said contract. In my opinion, under section 24(b) of the Contracts Act, the contract in question is a valid contract.

Mr. Chin quoted extensively the judgment of Devlin J. in *St. John Shipping Corporation* v. *Joseph Rank Ltd.*[3] in support of his argument that the contract in question is not a valid contract. But the decision in that case does not support his argument. In that case Devlin J. decided:

"that the infringement of a statute in the performance of a contract which was legal when made did not render the contract illegal unless the contract, as performed, was one which the statute meant to prohibit, and that, on a true construction of the Act of 1932, having regard to its scope and purpose, contracts for the carriage of goods were not within the ambit of the statute at all so that the plaintiffs' infringement of sections 44 and 57 did not prevent them from suing on the contract."

Mr. Chin also referred to clause 4 of the conditions of the said contract. The clause, *inter alia*, states that "the contractor shall comply with... any written law applicable to the territory or territories of Malaysia in which the works are to be carried out." According to Mr. Chin, this clause amounts to a condition precedent which must be fulfilled by the plaintiff. I agree with him that under this clause the plaintiff must comply with all written laws including the requirement for the plaintiff to be registered as a foreign company. But non-compliance with clause 4 is only a breach of the condition in that clause and such non-compliance does not render the said contract a nullity.

Mr. Robert Lazar, counsel for the plaintiff, conceded that the plaintiff did not register itself pursuant to section 332(1) of the Companies Act. According to him, non-compliance with the requirement of that section merely opens the plaintiff to a penalty but does not affect the validity of the said contract. In my view, Mr. Lazar's submission is correct.

The next question for the court to consider is section 24(e) of the Contracts Act, that is, whether the contract in question is opposed to public policy. The categories of agreements which are opposed to public policy under section 24(e) have been enumerated by the Federal Court in *Theresa Chong* v. *Kin Khoon & Co.*[4] Gill C.J. (Malaya) in his judgment at p. 256 stated as follows:

"It is to be observed that section 24 deals with such consideration and objects of a contract as are unlawful and therefore illegal. This section is *in pari materia* with section 23 of the Indian Contract Act. *Pollock and Mulla on the Indian Contract Act* (8th Ed.) in its commentary on section 23 under the heading 'Opposed to Public Policy' says this:

'The general head of public policy covers, in English law, a wide range of topics. Agreements may offend against public policy by tending to the prejudice of the state in time of war (trading with enemies, *etc.*), by tending to the perversion or abuse of municipal justice (stifling prosecutions, champerty and maintenance) or, in private life, by attempting to impose inconvenient and unreasonable restrictions on the free choice of individuals in marriage, or their liberty to exercise any lawful trade or calling... It is now understood that the doctrine of public policy will not be extended beyond the classes of cases already covered by it. No court can invent a new head of public policy.' "

In the instant case, the object of the said contract was the construction of a building in Penang. The said contract does not fall within any of the categories mentioned in the judgment of the learned Chief Justice in the passage quoted above. I, therefore, find that the said contract is not opposed to public policy.

For the reasons stated above, I make an order in terms of prayers (1) and (2) of the application.

Order accordingly.

Solicitors: *Shearn Delamore & Co.; Allen & Gledhill.*

PALMCO HOLDING BHD. v. SAKAPP COMMODITIES (M) SDN. BHD. & ORS.

[O.C.J. (Zakaria Yatim J.) August 7, 1986]

[Kuala Lumpur – Suit No. C2324 of 1984]

Civil Procedure – Representative action – Requirements – Whether satisfied – R.H.C. 1980, O. 15 r. 12.

In this case, the first, second, third and fifth defendants filed four similar applications. In these applications, they sought the order of the court to strike out the plaintiff's writ of summons and that all further proceedings against them be stayed on the ground that the plaintiff's action is not properly constituted under Order 15 rule 12 of the Rules of the High Court 1980 in that the plaintiff is not entitled to sue on behalf of or as representing all purchasers of palm oil under future contracts which on March 13 & 14, 1984 were declared by the Kuala Lumpur Commodities Clearing House Sdn. Bhd. (KLCCH) to have been defaulted on. A fifth application was filed by the eighth defendant. In this application, the eighth defendant asked the court to stay all proceedings against it and/or the name of the eighth defendant be struck out on the ground that the plaintiff's claim does not disclose any cause of action against the eighth defendant.

Held: (1) in order to succeed in a representative action, the plaintiff must satisfy three requirements. They are: (a) the plaintiff and those represented by it are members of a class and that these members have a common interest; (b) the plaintiff and those it represents have a common grievance; (c) the relief sought is in its nature beneficial to them all. In the present case, the plaintiff and those represented by it have satisfied all three requirements. The applications of the first, second, third and fifth defendants are dismissed;

(2) since the fifth application was not argued at all, no order is made in respect of it.

Cases referred to:

(1) *In re Smith and Fawcett Ltd.* [1942] Ch. 304.
(2) *Leisure and Allied Industries* v. *Udaria Sdn. Bhd.* [1980] 1 M.L.J. 189.
(3) *Duke of Bedford* v. *Ellis* [1901] A.C. 1, 8.
(4) *Smith & Ors.* v. *Cardiff Corporation* [1954] 1 Q.B. 210.
(5) *Hardie and Lane Ltd.* v. *Chiltern & Ors.* [1928] 1 K.B. 663.

APPLICATION.

Sri Ram (*Y.M. Raja Abdul Aziz Addruse* with him) for the plaintiffs.

Cecil Abraham for the first defendant.

W. H. Tang for the second and sixth defendants.

K. H. Choong for the third defendant.

V. Kumar for the fourth defendant.

Kirubakaran s/o Kartigesu for the fifth defendant.

P. P. Royan for the seventh defendant.

S. E. Rajah for the eighth defendant.

Cur. Adv. Vult.

Zakaria Yatim J.: There are four similar applications filed by the first, second, third and fifth defendants. In these applications, they are seeking the order of the court to strike out the plaintiff's writ of summons and that all further proceedings against them be stayed on the ground that the plaintiff's action is not properly constituted under Order 15 rule 12 of the Rules of the High Court 1980 in that the plaintiff is not entitled to sue on behalf of or as representing all purchasers of palm oil under futures contracts which on March 13 & 14, 1984 were declared by the Kuala Lumpur Commodities Clearing House Sdn. Bhd. (KLCCH) to have been defaulted on. A fifth application was filed by the eighth defendant. In this application, the eighth defendant asks the court to stay all proceedings against it and/or the name of the eighth defendant be struck out on the ground that the plaintiff's claim does not disclose any cause of action against the eighth defendant.